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DISTRICT OF COLUMBIA DEPARTMENT
OF CONSUMER AND REGULATORY
AFFAIRS

Petitioner,

v.

XUYEN THI VU

Respondent.

Case No.: CR-C-07-100082
(ALJ Goode)

ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS

I. INTRODUCTION

On November 20, 2007, I issued a Final Order granting Respondent's motion for summary judgment, invalidating the Government's denial of Respondent's Basic Business License application, and requiring the Government to issue Respondent a Class A Vendor's License no later than November 23, 2007. On November 28, 2007, Respondent filed a motion to hold the Government and Joseph Schilling, Administrator, Business and Professional Licensing Administration ("BPLA"), in contempt for failing to comply with my Final Order. The Government filed an opposition to the pending motion on December 11, 2007, and a hearing on that motion was held on December 13, 2007.

At the December 13, 2007, hearing, the Government was represented by Jill Stern, Esq., and Lori Parris, Esq., and Respondent was represented by Ronald Webne, Esq. Joseph Schilling, Administrator, BPLA, testified on behalf of the Government. Respondent attended the hearing but did not testify. At the conclusion of the testimony and after hearing argument from counsel

for both parties, I announced that I would hold the pending motion for sanctions in abeyance and ordered the Government to meet certain terms in an attempt to bring itself into compliance with my Final Order. On December 21, 2007, the Government filed a Status Report indicating that it complied with my instructions and issued a Vendor's License to Respondent on December 18, 2007. Based on the Government's compliance with the November 20, 2007, Final Order (albeit untimely), I have decided to deny Respondent's pending motion for sanctions. My December 5, 2007, Order Convening Sanctions Hearing and my November 20, 2007, Final Order set forth the history of this case, so I will not repeat that detailed history here. However, based on the testimony of Mr. Schilling on December 13, 2007, the Government's December 21, 2007, Status Report, and the entire record herein, I make the following findings of fact and conclusions of law.

II. BACKGROUND

On or about January 29, 2007, Respondent filed an application for a Class A Vendor's License. On May 31, 2007, the Government denied Respondent's application for a Basic Business License ("BBL"), because she allegedly had violated the "Clean Hands" certification in her application by failing to disclose that she owed the Government \$18,000 in fines and penalties for violations of the Civil Infractions Act (D.C. Code, 2001 Ed. §§ 2-1802.01(a)). *See* the May 31, 2007, Notice to Deny Basic Business License ("Notice"). On June 6, 2007, Respondent filed an appeal to challenge the denial of her application. At a status conference on October 25, 2007, the Government could not identify any specific Notices of Infraction ("NOIs") that were issued and served on Respondent that were outstanding and for which Respondent was liable for fines and penalties.

The Government was given another opportunity to establish the basis for its denial of Respondent's BBL by filing "a complete and comprehensive statement of the factual basis for the denial of Respondent's application for a Basic Business License" no later than November 9, 2007. *See* October 26, 2007, Scheduling Order, page 2. On November 9, 2007, the Government complied with the Order and indicated that there were four outstanding NOIs; however, the Government acknowledged that liability had not attached to Respondent for any of the four NOIs. A status conference in this matter was held on November 15, 2007. Respondent Xuyen Thi Vu appeared with her attorney Ronald Webne, Esq., and Charles Thomas, Esq., appeared for the Government. Based on the Government's November 9, 2007, Response ("Government's Response"), Respondent moved orally for summary adjudication. OAH Rule 2828. Counsel for the Government candidly conceded that there was no genuine issue of any material fact concerning this case, and offered no argument in opposition to Respondent's motion. Simply put, the \$18,000 fine and penalty arrearage did not exist. Therefore, as noted above, on November 20, 2007, I issued a Final Order granting Respondent's motion for summary judgment, invalidating the Government's denial of Respondent's Basic Business License, and requiring the Government to issue Respondent a Class A Vendor's License no later than November 23, 2007.

On November 28, 2007, Respondent, unable to coax BPLA into complying with the plain language of my Final Order, filed a motion for sanctions. In her November 28, 2007, motion Respondent argued that I should apply the legal standard governing civil contempt to this circumstance and fine the Government for noncompliance. The Government countered that I should apply the legal standard controlling sanctions against attorneys under SCR- Civil Rule 11, that the Government had not acted in bad faith or intentionally failed to comply with the Final

Order, such that no monetary sanctions should be levied. I scheduled a sanctions hearing, pursuant to D.C. Code, 2001 Ed. § 2-1831.09(b)(8), to take evidence and hear argument on whether BPLA's failure to comply with the Final Order warranted imposition of monetary sanctions.

III. FINDINGS OF FACT

1. BPLA licenses over 35,000 professionals, tradesmen, corporations and vendors in the District of Columbia. BPLA processes approximately 500 new and renewal license applications per week. In addition to a BPLA application, applicants for Vendor's Licenses are required to file a tax certification from the D.C. Office of Tax and Revenue ("OTR"), a police report on the applicant's criminal history from the applicant's place of residence, and certification from the D.C. Department of Health ("DOH") approving the vendor's vehicle.

2. Applications for vendor licenses are processed by BPLA, and transmitted to the Department of Consumer and Regulatory Affairs' ("DCRA") Investigations Division, which investigates the applicant. The Investigations Division is not an administrative component of BPLA. After completing its investigation, the Investigations Division issues findings and a recommendation. If the recommendation is to deny an application, the DCRA Office of General Counsel ("OGC") reviews the report and recommendation for legal sufficiency.

3. Once the Investigation Division and (potentially) OGC complete their review, the application is returned to BPLA. If the application is returned to BPLA after six months has passed since the applicant submitted her application, BPLA requires the applicant to re-submit its application and obtain new certifications from OTR, the police and DOH. BPLA requires the applicant to re-file its application even if the applicant bears no responsibility for the lapse of six

months. Neither the governing statute nor controlling regulations dictate that a new application be filed. BPLA's enforcement powers are plenary, such that licenses can be revoked for the same or more reasons than an application may be denied.

4. If a major hurdle to approval of an application is discovered, the investigation is aborted, and an application denial letter is issued by BPLA. The denial letter will not, by design, explain all of the reasons that an application has been or could be denied. If an applicant corrects the problem identified in the denial letter, the application subsequently may be denied for reasons that were known to BPLA prior to issuance of the denial letter.

5. Mr. Schilling, BPLA Administrator, was on personal leave from approximately noon on November 21, 2007, until November 26, 2007. Mr. Shilling's staff had received my November 21, 2007, Final Order, that required action by November 23, 2007, but did nothing with the Order, except wait for Mr. Schilling's return from leave. Mr. Schilling learned of the Final Order during the afternoon of November 26, 2007.

6. Without consulting OGC, Mr. Schilling decided that the appropriate response to my order that the Government had to issue a license to Respondent within three calendar days was to require Respondent to re-file her application (with new certifications), and send the "new" application to the Investigations Division for another investigation. Mr. Schilling understood that to initiate this review process was to ensure that Respondent would not receive her license for, most probably, more than forty-five additional days. Mr. Schilling also understood that if the Investigation Division and (potentially) OGC took more than six months to complete the investigation, Respondent would have to file a third "new" application for a vendor's license.

Mr. Schilling also understood that, at least theoretically, this process might turn into an endless loop of “new” applications and investigations every six months, with no resolution in sight.

7. As of April 2007, Mr. Schilling knew from correspondence from Respondent’s attorney that Respondent took the position that the delays associated with her license application were the result of unfair/discriminatory treatment. When Respondent filed her application in January 2007, she did not submit verification that DOH had inspected and approved Respondent’s motor vehicle.

8. On December 18, 2007, Respondent took her vehicle to the DOH inspection yard. DOH approved Respondent’s vehicle and issued an approved Establishment Inspection Report. BPLA also approved Respondent’s vehicle. Based on these approvals, BPLA issued Respondent a Vendor’s License (number 44410599), which expires on December 17, 2009.

IV. DISCUSSION

The regulations governing BBL applications require that “[n]ot later than forty-five (45) days after filing a completed application for a vending business license, the applicant shall be notified by the Mayor of the Mayor’s decision on the issuance or denial of the license.” 24 DCMR 505.1 (emphasis added). Additionally, the regulations governing BPLA and the denial of BBL applications state that if the Government decides to deny an application, “[n]otice of the denial or suspension or revocation shall be given in writing, setting forth specifically the grounds therefor [sic]. . . .” 24 DCMR 509.4 (emphasis added). As previously noted, the \$18,000 arrearage associated with the NOIs neither existed at the time Respondent’s license was denied in May 2007, nor has it existed at any time relevant to my decision since May 2007.

Respondent filed an application for a BBL (Class A Vendor's License) on January 29, 2007, and the Government, through Mr. Schilling, did not issue its notice of denial until May 22, 2007, more than 45 days after Respondent filed her application. The Notice attributed the denial to four Notices of Infraction ("NOIs") that alleged Respondent was operating a vending stand without a license.¹ However, as noted in the November 20, 2007, Final Order when the Notice was issued on May 22, 2007, the Government knew or should have known that the unproven allegations in these NOIs had not resulted in any judgment against Respondent. Worse yet, on May 22, 2007, when it issued the Notice, the Government knew that two of the four NOIs had been dismissed without prejudice because Respondent had never been served.

My November 20, 2007, Final Order contained a certificate of service showing that it was mailed to Jill Stern, General Counsel, Department of Consumer and Regulatory Affairs, and the Government's counsel of record, Charles Thomas, Esq. Thus, the Government had notice that it was required to issue Respondent a Class A Vendor's license no later than November 23, 2007. My Final Order clearly indicated that it had no bearing on any future enforcement actions and it also set forth the parties' appeal rights.

The Government's disregard of my November 20, 2007, Final Order without lawful basis was a serious matter. Withholding a license to operate a business has serious consequences for the license applicant and the fiscal wellbeing of this City, and can be done lawfully only within the framework of the governing statute and regulations. While this administrative court does not take the imposition of sanctions lightly, the fair and efficient administration of justice is

¹ One of the greatest ironies of this case is the fact that Respondent's BBL application was for a vendor's license; in other words, it was Respondent's attempt to bring her business into compliance with the very law that the Government indicated she was violating when it issued the NOIs.

irreparably impaired by the failure of persons within the court's jurisdiction to comply with its lawful orders.

BPLA is responsible for processing a large number of license applications every week, and for monitoring an even larger number of licensed persons and entities. I understand that this is a difficult job, made even harder by limited resources. Mr. Schilling testified that he sincerely thought that he was complying with my November 20, 2007, Final Order to issue Respondent's license within three calendar days by implementing a review process that would take, in all probability, more than forty-five days. While I accept Mr. Schilling's testimony as truthful, as I explained at the December 13, 2007, Sanctions Hearing, it is hard for me, let alone the average customer of DCRA and BPLA, to contemplate how a court order requiring definitive action within three days could be complied with by instituting a process that has no guaranteed outcome and will take over forty-five days to complete.

Nonetheless, I have concluded that BPLA's belated compliance with my November 20, 2007, Final Order, coupled with Mr. Schilling's stated intention to comply with that Order justify denying Respondent's motion for sanctions.²

² Given this decision I will leave for another day resolution of the question whether the appropriate legal standard for assessing sanctions under D.C. Code, 2001 Ed. § 2-1831.09(b)(8) is that governing civil contempt (Respondent's view) or that controlling attorney sanctions governed by SCR – Civil Rule 11 (the Government's view).

V. ORDER

Accordingly, it is this 30th day of January 2008, hereby

ORDERED that Respondent's November 28, 2007, motion for sanctions is **DENIED**.

January 30, 2008

_____/SS/
Jesse P. Goode
Administrative Law Judge